

CECW-OR

MEMORANDUM FOR THE RECORD

SUBJECT: Nationwide Permit Program Class Review for Compliance with EO 11988 Floodplain Management

**Purpose:** In order to improve efficiency but yet maintain a desirable level of compliance with Executive Order 11988, a floodplain evaluation class review may be made of certain routine or recurring actions. The class action review is described in FEMA's document Further Advice on Executive Order 11988 Floodplain Management. The Corps has considered that the NWP's are in full compliance with EO 11988, however, a formal class action has not been developed. The following review summarizes the Corps floodplain evaluation class action of the NWP's.

**Background:** The Nationwide Permits (NWP's) are issued under the authority of Section 404(e) of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. NWP's are a type of general permit that authorize activities on a national basis. The NWP Program provides for the authorization of minor activities that result in no more than minimal adverse effects on the aquatic environment. The Corps has issued 43 NWP's. The NWP's are issued after notice and opportunity for public review and comment. The NWP's are limited by the terms of the NWP's and by national general conditions, regional conditions, case-specific conditions, and State and Tribal 401 and CZM conditions.

**Similar Routine Recurring Actions:** Nationwide permits authorize activities that are similar in nature and have minimal impacts on the aquatic environment. These activities routinely occur in waters of the United States, which is a subset of the floodplain.

**Alternatives:** Most activities that are authorized by the Corps occur within waters of the United States that are located within the floodplain, as defined in EO 11988. However, many other activities occur in waters of the United States outside of the floodplain, such as navigable isolated waters and waters above the areas on tributaries that are subject to a one percent or greater chance of flooding in any given year. Many NWP authorized activities must be located in the floodplain to serve their basis purpose; such as, mooring buoys, transportation river crossings, emergency watershed protection, and stream and wetland restoration. Furthermore, most activities authorized by NWP's do not affect or have negligible adverse effects on floodplain values; such as, mooring buoys, fish harvesting devices, stream gauges, and utility line crossings where pre-construction contours are required to be restored. For NWP authorized activities that have the potential to adversely affect the aquatic environment including floodplain values, a pre-construction notification (PCN) is normally required. Corps District Engineers will review those PCNs to ensure that the activity proposed to be authorized by NWP will comply with the terms and conditions of the NWP's, including general condition 26. Of course, the Corps has no authority to prevent any activity from occurring within a floodplain where there is no regulated activity occurring within waters of the United

States. We believe that an alternatives analysis is not required by Section 2 (a)(2), when there are no adverse effects or when the activity must be located within the floodplain to serve its basic purpose. Consequently, the Corps believes that we are fulfilling this requirement, to the degree that we have the authority to do so. Finally, most NWP authorize activities that are always located in floodplains to meet their intended purpose: such as, aids to navigation, mooring buoys, bank stabilization, and marina maintenance. Some NWPs have no impact on floodplain capacity: such as, utility lines, repair of existing structures, and maintenance of flood control facilities.

**Minimization of impacts:** Activities authorized by NWPs must avoid impacts to aquatic resources on-site and also must minimize on-site impacts to aquatic resources. For those impacts that cannot be avoided and minimized on-site, compensatory mitigation is required for those impacts. The NWPs are limited by the terms of the NWPs and by national general conditions, regional conditions, case-specific conditions, and State and Tribal 401 and CZM conditions. NWPs are routinely conditioned to ensure that adverse effects on aquatic resources are no more than minimal, individually and cumulatively. The Corps has imposed a NWP general Condition that requires that activities authorized by NWPs must comply with FEMA construction requirements. Thus, appropriate activities must meet the FEMA requirements regardless of whether the permittee gets flood insurance. Also certain NWPs that have the most potential to impact floodplains are prohibited below the headwaters on tributary systems.

**Minimum Construction Requirements:** Section 3(a) of EO 11988 establishes that Federal agencies at a minimum, require the construction of Federal structures and facilities to be in accordance with the standards and criteria and to be consistent with the intent of those promulgated under the National Flood Insurance Program (NFIP). This is the standard required by FEMA. This standard has also been adopted by many other Federal agencies. For example, the U.S. Postal Service at 39 CFR 776.6 established this as the standard for postal facilities. Nationwide Permit general condition 26 (Fills within 100-year Floodplains) requires that all NWPs comply with applicable NFIP construction requirements. We believe that this is the appropriate standard for Corps permits. We further believe that it would be inappropriate to require a higher standard for the public than the Federal Government requires of itself. Notwithstanding the previous statement, by general condition 26 we have prohibited several NWPs from authorizing permanent above grade fills below the headwaters and in the floodway in headwaters. This ensures that the activities that are most likely to have the potential to result in adverse effects to floodplain values will be evaluated under the individual permit process, not the NWP process.

**Public Review:** Nationwide Permits are proposed at a minimum of every five years for public review and comment and an opportunity for a public hearing. They are published in the Federal Register and by District Public Notices and on the internet. This fully complies with Clean Water Act and National Environmental Policy Act requirements and with EO 11988.

**Lead Federal Agency:** Many NWP authorized activities are Federal activities or activities funded or licensed by Federal agencies. The Corps, in virtually all cases, is only authorizing a portion of the overall project that is constructed, funded or licensed by another Federal agency. As such the other Federal agency is responsible for compliance with EO 11988. The Corps will not provide oversight regarding or second guess the other Federal agency's determination regarding compliance with EO 11988.

**State and local requirements:** Many state and local agencies address impacts on floodplain values and prohibit, restrict, or mitigate any such adverse impacts. The Corps program relies on those programs, where they exist. Further, general condition 26 encourages potential permittees to consider floodplain impacts before contacting the Corps. This usually involves contacting the appropriate state and local agencies.

**CONCLUSION:** Based on the above we have determined that the U. S. Army Corps of Engineers Nationwide Permit Program is in full compliance with Executive Order 11988 on Floodplain Management.

4 JAN 2002



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